IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 18, 2003

STATE OF TENNESSEE v. LEVAR DERRON LEE

Direct Appeal from the Circuit Court for Maury County
No. 12983 Stella Hargrove, Judge

No. M2002-02455-CCA-R3-CD - Filed January 12, 2004

A Maury County jury found the Defendant, Levar Derron Lee, guilty of domestic assault. Following a sentencing hearing, the trial court denied the Defendant's request for alternative sentencing and sentenced the Defendant to serve 11 months and 29 days to be served at 75% in the county jail. The Defendant appeals, contending that the trial court erred when it denied his request for alternative sentencing. Finding no reversible error, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JERRY L. SMITH, JJ., joined.

William C. Barnes, Jr., Columbia, Tennessee, for the appellant, Levar Derron Lee.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; J. Ross Dyer, Assistant Attorney General; T. Michel Bottoms, District Attorney General; Joseph Lee Penrod, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
I. Facts

The Defendant was indicted for, and found guilty of, one count of domestic assault, a Class A misdemeanor, that occurred on January 4, 2002. At the sentencing hearing, the Defendant's presentence report was introduced into evidence as an exhibit. The report showed that the Defendant was arrested for marijuana possession on December 22, 1999, and pled guilty to that offense on December 5, 2000. The Defendant was placed on judicial diversion for 11 months and 29 days and fined $250. The report indicated that, while on diversion, the Defendant was arrested for assault on March 23, 2001, ("Assault 1") and reckless driving on August 17, 2001.

Evidence was introduced that the Defendant was arrested three times for assault against the victim, Veena Johnson ("victim"). The presentence report indicated that Assault 1 occurred on

March 23, 2001, for which he was convicted and placed on probation. The second arrest for assault ("Assault 2") occurred on January 4, 2002. It is the sentencing on this assault charge that the Defendant now appeals. The third arrest for assault ("Assault 3") occurred on or about July 15, 2002, two days before the Defendant's trial for Assault 2, and the indictment for Assault 3 was dismissed.

At the sentencing hearing the victim testified that she had a child with the Defendant and that the Defendant visited the child but that she and the Defendant were no longer involved in a romantic relationship. She explained that the Defendant was no longer welcome at her house but that he could visit the child at his aunt's house or her mother's house. The victim testified that it was during one of these visits that Assault 3 occurred. She stated that she does not fear the Defendant nor does she feel that she has to be present when the Defendant visits with their child.

The victim testified that the Defendant's sentence for Assault 1 was diverted. She explained that the incident occurred approximately "two years ago" while she and the Defendant were still involved in a romantic relationship. The victim stated that she now believed Assault 1 was "accidental."

The victim stated that the Defendant was found guilty of Assault 2. She testified that when the Defendant assaulted her on this occasion, he pulled her out of her car at her apartment complex. She explained that she hurt her back as a result of the fall to the pavement but that she did not seek medical treatment. She stated that she suffered no permanent injury as a result of the attack. The victim testified that she "had pain for a couple of weeks . . . but it did not last . . . ." She testified that she no longer has any pain from the assault.

The victim testified that the Defendant acted physically violent towards her once or twice before Assault 3. She explained that the Defendant hit her, which resulted in bruises on her neck, arms and legs. She stated that Assault 3 occurred the day before the trial for Assault 2. The victim stated that the Defendant did not push her off the porch, but rather she slipped and fell off the porch. She testified that she injured her ankle during the fall and that she sought medical attention for the injury. She stated that she also sought an order of protection against the Defendant.

On cross-examination, the victim recounted Assault 2, the charge at issue in this case. She explained that the Defendant "jerked [her] out of the car and [she] fell down to the ground . . . ." She stated that she went into her house and called the police. Johnson then described the events of Assault 3, which took place at the Defendant's aunt's house. She explained that she went to the aunt's house to allow the Defendant to visit with their child, as well as to discuss the upcoming trial for Assault 2. Johnson testified that she and the Defendant got into an argument about whether the child was going to be allowed to stay at the aunt's house. She stated that when she started to leave, the Defendant was standing behind her but she was unsure if she had slipped or been pushed off the porch by the Defendant. The victim testified that, since the incident on the porch, she and the Defendant have not had any physical contact. She stated that she is not afraid of the Defendant, she does not need or want an order of protection against him, and that she has no problem with the

Defendant visiting the child.

The Defendant's aunt, Roslyn Baker, testified on behalf of the Defendant. She testified that the Defendant is her nephew and that he lives at her house from time to time. She also testified that the victim brings the child to her house to visit the Defendant. Baker explained that she has known the Defendant his entire life and that he is not a violent man. She stated that she witnessed the altercation between the Defendant and the victim that took place on the porch and that the Defendant did not push the victim. "All I saw is that he took [the child] as he was reaching for [the child, the victim,] the way she was standing, she lost her balance and she fell." Baker denied that the Defendant pushed, hit or shoved the victim at any time. She testified that she did not see the Defendant push or shove the victim in any way.

On cross-examination, Baker stated that she helped raise the Defendant and that he had "been around [her] all of his life." However, she testified that she was "[n]ot really familiar" with his past charges of assault. Baker admitted that she knew the Defendant had been charged with assault before, but did not know the details surrounding the incident. She denied that the Defendant had a problem with his temper. Baker testified that she did not witness any of the confrontation that occurred in the house because "[she] was asleep and when [she] woke up they were on the porch." She further testified that she did not hear the Defendant and the victim arguing prior to the incident on the porch. Baker explained that after the victim fell off the porch, the Defendant did not do anything. She explained that the Defendant had the child and that the victim left and was limping "a little bit." Baker stated that the Defendant walked with the victim to her car.

The Defendant next called Reverend Willy Hill Turrentine. Reverend Turrentine testified that he knew the Defendant personally but did not know the Defendant's reputation in the community. He explained that he had "been dealing with [the Defendant] for the last three or four months." The reverend stated that in that time he had seen a "big change" in the Defendant. Reverend Turrentine explained that when he first met the Defendant, he saw a "very disturbed young man" but now he sees a man who has found God and is thankful for the changes in his life. The reverend testified that he does not know the Defendant to be a violent man, but rather an individual who is concerned with "trying to help [young children] with the Sunday school lesson . . . and telling them to stay out of trouble . . . ."

On cross-examination, Reverend Turrentine admitted that he based his opinions about the Defendant from observations over a three to four month period. He also admitted that he was unaware of any prior legal troubles including assault and possession charges.

The Defendant next testified on his own behalf. The Defendant recounted his version of the incident. He explained that he was at his aunt's house when the victim came by with their child. He stated that the victim wanted to speak with him about working out "some kind of probation or something" with regards to Assault 2. The Defendant testified that the victim got upset and started to leave, that he followed her and picked up the child, and that he started to walk to the front door. He explained that when they got to the victim's car, he asked her not to come back. He stated that,

at this time, the child was still in his aunt's house.

The Defendant testified that the victim then returned, and they continued to talk about the assault charge from when he pulled her out of her car in front of her apartment complex. He stated that, at some point during the conversation, the victim grabbed the child and proceeded to leave. The Defendant admitted that he tried to get the child back from the victim. He stated that the victim fell over a chair but denied that he intentionally pushed or shoved her. He testified that all he was trying to do was to grab the child. The Defendant explained that "the only way [the victim] could have [fallen] is if she had taken that step back . . . not knowing that chair was right by the door . . . and tripped over it." The Defendant denied intentionally hurting the victim and explained that he would not do that realizing that he had to go to court the next morning for an earlier assault charge involving the victim. The Defendant admitted that he made contact with the victim, but explained that it was because of the struggle for the child. The Defendant denied "nudging" or throwing his shoulder into Johnson. He explained that any contact with the victim was incidental, and only the result of his efforts to keep the child with him rather than allow the child to leave with the victim.

The Defendant testified that, since the incident on the porch, he and the victim have had no problems or altercations. He further testified that he continues to visit with the child approximately once a week and that he helps to financially support the child. The Defendant explained that the only assault charges on his record involve incidents between him and the victim, and that they all occurred while he and Johnson were still in a relationship with one another. He stated that he completed his probation on the first charge. He testified that the victim had an assault warrant against him and that he and his aunt had a trespassing and vandalism warrant against the victim, but he explained that all parties dropped the charges.

The Defendant stated that he is currently unemployed because he was laid-off by his employer. He explained that he was waiting for his car to be fixed before he seeks new employment so that he can be sure he can get to and from work. The Defendant testified that he helps children at the church by explaining the lessons from Bible school and that he will "sit down and speak with them . . ." if they have any questions. He also stated that he will give them life lessons and guide them from his own life experiences.

The Defendant testified that there was no reason he could not be on probation rather than serve jail time. He explained that he did not enjoy his experiences with the criminal justice system and that if he was placed on probation, the judge would "[d]efinitely not" have to worry about seeing him in her courtroom again. "I don't want to be sitting on this end of the judicial system. This is not, this is not for me." He stated that he had no problem with the judge issuing an order to stay away from the victim or to going to some type of counseling. He explained that if there was going to be contact between him and the victim, counseling "would be beneficial." The Defendant testified that he was not on drugs or narcotics and that he was willing to submit to a drug test.

On cross-examination, the Defendant stated that the possession of marijuana charge was diverted and that he completed his probation on Assault 1. He admitted that, including the charge

from Assault 1, he was accused of assault three times. He explained that Assault 3, arising from the incident on the porch, was dismissed. The Defendant testified that Assault 3 lasted between 15 and 20 minutes and that he never hit her. He explained that the second arrest for assault arose from an incident in which he "did grab [Johnson] and pull her out of her car to protect [himself] because she was behind [the wheel of] the vehicle, using it as a weapon," but he never hit or kicked Johnson at any time. The Defendant stated that "if [the State] classif[ies] when [he] turned away and she fell off the porch as a shove," that is the only time he shoved her.

The Defendant testified that he does not have any child visitation scheduled or set up by the court. He explained that, if he wants to see the child, he and the victim work out an arrangement. He stated that this does not create any problems. He also testified that he does not pay any court-ordered child support. He explained that he takes care of his daughter. "[W]hatever she needs, clothing, I can do that. I have a mother that sends me money any time I need. My grandmother, my father, my aunts help out as much as they can."

Before sentencing the Defendant, the trial court reviewed the sentencing factors, stating:

> [Defendant], this jury didn't believe your version and the Court doesn't either. As I recall, . . . we had an unusual trial from the standpoint of two unbiased third-party witnesses, [who] didn't have a stake in this case. . . .
>
> And they testified about what happened and obviously the Court did not believe [the Defendant's] version of how he was attempted to be run over that day and the court doesn't believe it either and you are still sticking with your same story. . . .
>
> This is a misdemeanor conviction. There is no presumption as to minimum sentence that the Court has to deal with as compared with felonies. There's no presumption of alternative sentence . . . in misdemeanor convictions.
>
> Even though this is a misdemeanor sentencing hearing the court has to consider the investigation report and the general principles of sentencing.
>
> One of the things . . . that strikes me about this defendant is that he was placed on post-plea diversion and there's no question about that today that the court has heard. That post-plea diversion was for 11 months and 29 days and that conviction or that post-plea diversion went down on December 5, 2000.
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> So he, obviously, was on that diversion when he is charged with [Assault 1] because that charge, regardless of what happened with it, the event date, the date of arrest was March 23, 2001.
>
> And so clearly in this Court's mind he was still on diversion because that

diversion would have ended on December 5, 2001. So the Court is not really concerned with what even happened in that case.

He also has a reckless driving conviction that goes back to an arrest date of August 17, 2001, so he was still – he was on post-plea diversion when that happened.

So, obviously, he doesn't take diversion very seriously. I don't know what happened to his diversion, I haven't heard that in this sentencing hearing today. The Court, as we discussed earlier, can consider that as part of his criminal arrest record or history and will do so.

The court, in misdemeanor sentencing, considers whether [the Defendant] is a favorable candidate for probation. He's had diversion; that is a form of probation. He's committed–has been arrested twice while he was on diversion in the Court's thinking. He says now that he's willing to go to counseling.

I'm not sure that he means that. I think that [the Defendant] feels like [] he's a man that's in control. He doesn't take responsibility for his actions. He has a story that he's sticking with and that is flat out denial.

The court finds that he has given blatantly false testimony both at trial and at sentencing. And in considering all that, the Court does impose a sentence of 11 months and 29 days of which he will serve 75 percent. And he will go into custody today.

The trial court denied any form of alternative sentencing and ordered the Defendant to serve his sentence, 11 months and 29 days to be served at 75% in the county jail.

The Defendant appeals, contending that the trial court erred when it denied him alternative sentencing.

II. Analysis

In misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the trial court is required to allow the parties a reasonable opportunity to be heard on the question of the manner in which it is to be served. Tenn. Code Ann. § 40-35-302(a). In this case, the trial court did so. Further, the sentence imposed must be specific and consistent with the purposes and principles of the Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. § 40-35-302(b). A percentage of not greater than seventy-five percent of the sentence should be fixed for service, after which the Defendant becomes eligible for "work release, furlough, trusty status and related rehabilitative programs." Tenn. Code Ann. § 40-35-302(d).

The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum

sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). However, in determining the percentage of the sentence to be served in actual confinement, the court must consider enhancement and mitigating factors as well as the purposes and principles of the Criminal Sentencing Reform Act of 1989, and the court should not impose such percentages arbitrarily. Tenn. Code Ann. § 40-35-302(d).

When a criminal defendant challenges the length, range, or manner of service of a sentence, the reviewing court must conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). The Tennessee Supreme Court has held that in misdemeanor sentencing a trial court is not required to place specific findings on the record. State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998). A trial court need only consider the principles of sentencing and the enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute. Id. In this case, to determine the manner of service of the sentences, the trial court considered appropriate enhancement and mitigating factors and the principles of sentencing. Therefore, our review in this case is de novo with a presumption of correctness.

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). The defendant bears the burden of showing the impropriety of the sentence imposed. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The Defendant argues that he should have been granted some form of probation. In determining whether to grant or deny probation, the trial court may consider the circumstances of the offense; the defendant's criminal record, background and social history; the defendant's physical and mental health; the deterrent effect on other criminal activity; and the likelihood that probation is in the best interests of both the public and the defendant. State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). The Defendant bears the burden of establishing suitability for probation. Tenn. Code Ann. § 40-35-303(b); Ashby, 823 S.W.2d at 169.

In the present case, the record reflects that the Defendant was on diversion at the time of the arrest for assault which occurred on March 23, 2001, and at the time of the arrest for reckless driving on August 17, 2001. The trial court stated that she did not believe the Defendant's version of the story and that he was not a good candidate for probation. "He's committed–has been arrested twice while he was on diversion in the Court's thinking." Furthermore, the judge stated that the Defendant "feels like [] he's a man that's in control. He doesn't take responsibility for his actions. He has a story that he's sticking with and that is flat out denial." In the trial court's opinion, the Defendant gave "blatantly false testimony" at both the trial and sentencing hearing.

The Defendant did not take advantage of his diversion for marijuana possession as evidenced

by two arrests during that period, one of which was an arrest for assault against the same victim. It is within the trial court's discretion to determine whether confinement is necessary to protect the interests of society. See Tenn. Code Ann. § 40-35-103(1)(A)-(C). The trial court found that an enhancing factor applied in that the Defendant showed an "unwillingness to comply with the conditions of a sentence involving release in the community" having been arrested for two crimes during the period of his diversion. The trial court found no applicable mitigating factors. The record fully supports the trial court's findings and its determination denying the Defendant an alternative sentence. The Defendant has not met his burden of demonstrating the impropriety of the trial court's denial of alternative sentencing.

III. Conclusion

After review of the issue before us, we conclude that the Defendant has failed to establish that his sentence was improper. Accordingly, the judgment of the Circuit Court for Maury County is AFFIRMED.

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ROBERT W. WEDEMEYER, JUDGE